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IN THE

Supreme Court of the United States

October Term, 1977

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No. 657

ROBERT FLINT
and
THE CITY OF PHILADELPHIA,
Petitioners,

v.

HELEN GAGLIARDI,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit and the Order of the United States District Court for the Eastern District of Pennsylvania entering Judgment in favor of plaintiff and against defendants appears in Appendix A of the Petition.

JURISDICTION.

The Jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether in an action against a police officer under the Civil Rights Act, 42 U. S. C. § 1983, a United States District Court properly exercised pendent jurisdiction over an action brought by the same plaintiff under the 14th Amendment to the Constitution of the United States against the municipality which employed the police officer, where the facts to prove in each cause of action arose out of the same incident and were identical.

STATUTES INVOLVED.

The pertinent provisions of the statutory provisions involved are set forth in the Petition at pp. 3-5.

STATEMENT.

This litigation arises from the shooting death of Joseph Gagliardi, a twenty-four year old citizen of Philadelphia, Pa. on June 2, 1972 by Robert Flint, police officer employed by the police department of the City of Philadelphia.

An action was filed by Respondent, Helen Gagliardi, mother of the deceased against Officer Robert Flint, the City of Philadelphia and three superior police officers under the Civil Rights Act, 42 U. S. C. § 1983, the 14th Amendment to the Constitution of the United States and the Pennsylvania Survival and Wrongful Death Statutes. The claim against the three superior officers was based upon their knowledge of the dangerous propensities of Officer Flint by virtue of numerous complaints made against him by civilians, who had received brutal and abusive treatment at his hands, prior to his killing of Gagliardi.

The matter was tried in the United States District Court for the Eastern District of Pennsylvania, during the period July 15, 1975 to July 31, 1975 before the Honorable Clarence C. Newcomer and a Jury. The trial testimony revealed that in the early morning of June 2, 1972, Officer Flint, who was alone in his police car, drove to the scene as a result of a radio call that a male was sleeping on the porch of a residential property. Upon arriving at the scene, Officer Flint observed a man run from the steps of a house. Officer Flint took chase in his police car and overtook the individual (Gagliardi). According to the testimony of Officer Flint, an altercation developed when he attempted to take Gagliardi into custody. Although he weighed 40 to 50 lbs. more than Gagliardi and used his blackjack to attempt to subdue him, Officer Flint used his revolver, firing two shots at Gagliardi. According to Respondent's expert, the second shot caused the fatal wound

and the testimony revealed that at the time the fatal shot was fired, Gagliardi was running away from the police officer. Officer Flint at no time maintained that Gagliardi either had or appeared to have a weapon in his possession.

The trial court originally bifurcated the issues of liability against all defendants from the issue of damages. During the course of the trial, at the request of counsel for the Petitioners, the trial court further bifurcated the trial, limiting the jury to hear only evidence bearing on the liability of Officer Flint and the City of Philadelphia first, and thereafter to decide the liability of the superior officers and the damages to be awarded. On July 25, 1975 after deliberating for one hour, the jury returned a verdict against Officer Flint and the City of Philadelphia. Thereafter, the trial continued on the issues of the liability of the superior Police Officers and damages, at the conclusion of which the court granted a motion for a directed verdict on behalf of the three superior officers. On July 31, 1975, the jury assessed damages against Officer Flint and the City of Philadelphia in the sum of $116,570.00.

On May 20, 1976 the Honorable Clarence C. Newcomer denied Petitioners' motion for new trial and on May 28, 1976 denied Petitioners Motion for Judgment Notwithstanding the Verdict and to Remit the Amount of Jury Verdict. On June 17, 1976 Petitioners, Office Flint and the City of Philadelphia appealed the denial of their motions to the Third Circuit Court of Appeals and argument was listed for and held on February 25, 1977.

At oral argument respondent, with the oral authorization of the court and pursuant to 28 U. S. C. Section 1653 moved to amend the jurisdictional statement in its complaint to allege subject matter jurisdiction under 28 U. S. C. Section 1331. On August 10, 1977 the court of appeals granted Respondent's Motion and affirmed the judgment against the Petitioners, City of Philadelphia and Officer Flint.

ARGUMENT.

Initially, it must be noted that although the Petition for Writ of Certiorari is presented on behalf of both Officer Robert Flint and the City of Philadelphia, there are no allegations in the Petition directed to any error by the Circuit Court in affirming the Judgment against the individual police officer found liable by the Jury for the killing of Joseph Gagliardi. Therefore, it is submitted that on the record of this matter, the Petition on behalf of Police Officer Robert Flint should be dismissed forthwith since there are no allegations that he has been prejudiced by any alleged error.

Since, under such circumstances, the City of Philadelphia has, in all similar claims, paid the amount of the judgment on behalf of the police officer, it appears clear that Petitioner, City of Philadelphia, is in actuality seeking an advisory opinion on a jurisdictional issue. This, then, is the type of matter which this Court has traditionally declined to accept for review on Certiorari.

Further, Respondent submits that the Circuit Court did not err in allowing the Amendment under 28 U. S. C. § 1653 to include a cause of action under 28 U. S. C. § 1331(a) and in sustaining the exercise of pendent jurisdiction over the claim under Pennsylvania's Wrongful Death and Survival Acts.

It is clear that the Circuit Court had the authority under 28 U. S. C. § 1653 to amend the jurisdictional allegations in Respondent's complaint. *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3rd Circuit, 1976). Petitioner admitted at oral argument that no different testimony would have been presented at trial had an amendment been made at that time, but argued that there would still be no substantial federal claim against the City of Phila-

delphia upon which the trial court could engraft a pendent state claim.

In *Mt. Healthy City School District, Board of Education v. Doyle*, — U. S. —, 45 U. S. L. W. 4079 (1977) in a case involving the refusal of the Board to renew a teacher's contract and his claim that such action violated his rights under the First and Fourteenth Amendments, Justice Rehnquist in a unanimous decision, stated:

> "The related question of whether a school district is a person for purposes of Sec. 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under Sec. 1331 without regard to the limitations imposed by 42 U. S. C. Sec. 1983."

The *Mt. Healthy* case is, at the time of this writing, the most recent decision in this area of the law. It follows by six months, the decision in *Aldinger v. Howard*, 427 U. S. 1 (1977), where the question of jurisdiction under Sec. 1331 was clearly left open.[1]

It is submitted that this Court should follow its stand in the *Mt. Healthy* case and decline, upon the state of this record, to reach the constitutional question of whether a Fourteenth Amendment claim for damages under Sec. 1331(a) is subject to the limitations contained in Sec. 1983 which would then, in turn, bar any pendent claims against the Petitioner, City of Philadelphia.

1. The application of *Aldinger*, decided June 24, 1976, to this case tried in 1975 is questioned since the opinion of the majority gives no clue as to its intent for the decision to be prospective or retrospective. Justice Brennan in his dissent, stated "After today, a suitor seeking redress in a federal forum under Sec. 1983 and redress for the same wrongs under State law, must split his case and he is remitted to duplicate litigation no matter how expensive, wasteful and needless. *Aldinger, supra* 427 U. S. 1, 44 L. W. 4988 at P. 4993.

As noted by Judge Rosen in the Opinion of the Court below:

> "Since there is no Supreme Court decision holding that a Fourteenth Amendment damage remedy may *not* be implied and numerous lower court decisions holding that such a remedy may be, *see* the cases cited in Note 3 of Judge Gibbons' concurring opinion, we cannot say that the Fourteenth Amendment claim against the City is 'so insubstantial, implausible, foreclosed by prior decision of the (Supreme) Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court.'" *Hagans, supra*, 415 U. S. at 643, quoting *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661, 666-67 (1974).

Since *Aldinger* does not overrule the court's prior decision in *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966), and the substantiality of the claim under the Fourteenth Amendment is manifest, it is within the discretion of the district court to exercise its pendent jurisdiction to decide a state claim against the same defendant.

This position was reiterated by the Circuit Court in *Mahone v. Wadde, Ellway and City of Pittsburgh*, — F. 2d — (3rd Circuit 1977). See also *Hagans v. Lavine*, 415 U. S. 528 (1974); *Siler v. Louisville & Nashville R. Co.*, 312 U. S. 175 (1909); *Mayor of Philadelphia v. Educational Equality League*, 415 U. S. 605 (1974).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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